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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In Re:	No. X83-04-01-3008 & X83-04-02-3008
ARRCOM, INC., DREXLER ENTERPRISES, INC., et. al.,	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF APPEAL
Respondents.	

ERRORS ASSIGNED FOR REVIEW ON APPEAL

1. AS TO CRAGLE AND INMAN (OWNERS-LESSORS OF THE TACOMA FACILITY), THE PRESIDING OFFICER ERRED BY RULING THAT THEY WERE NOT, AS OWNERS OF THE RCRA FACILITY, ALSO LIABLE, JOINTLY AND SEVERALLY, FOR CIVIL PENALTIES FOR VIOLATIONS AT OR REGARDING THE TACOMA FACILITY.

2. THE ADMINISTRATIVE LAW JUDGE ERRED BY PURPORTING TO REVISE AND REISSUE A REGIONAL ADMINISTRATOR'S COMPLIANCE ORDER WHEN (NOTWITHSTANDING 40 CFR PART 22) THE ADMINISTRATIVE LAW JUDGE HAS ONLY THE POWER TO ENTER A DECLARATORY ORDER CONCERNING A REGIONAL ADMINISTRATOR'S ORDER WHICH THE ADMINISTRATIVE LAW JUDGE HAS ADJUDICATIVELY REVIEWED IN THE RESOURCE CONSERVATION AND RECOVERY ACT §3008 HEARING.

STATEMENT OF THE CASE

A statement of the case is presented in the November 21, 1985, Memorandum in Support of Appeal, submitted by Region X of EPA.

This supplemental memorandum is being submitted because of the national policy issues raised by this case. These issues have significance nationally for the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901, et seq., enforcement program

and the adverse precedential impact of this decision could be far-reaching in its effect on the RCRA program.

ARGUMENT

1. OWNER-LESSOR LIABILITY

The statutory language of RCRA explicitly imposes liability on owners as well as operators of hazardous waste management facilities. Congress did not link the scope of an owner or operator's liability to the scope of his or her control.

It is respectfully submitted that the Administrative Law Judge (ALJ), Judge Yost, erred in determining that respondents Cragle and Inman (the "owners") were not liable for failing to obtain a RCRA permit nor were they liable to perform appropriate closure activities at the facility because they were "arms-length lessors of a discrete piece of real property and had nothing whatsoever to do with the operation of the business . . . ." See Initial Decision, October 21, 1985, page 9. Judge Yost incorrectly assumed that unusual circumstances or connection with the actual operation of the facility are required to hold land owners liable under RCRA.

It is clear from both the statutory language of RCRA and the legislative history, that owners of hazardous waste management facilities, including persons who own property which is leased for the purpose of operating a hazardous waste management facility, are directly liable, jointly and severally, for compliance with RCRA, regardless of the scope of their control

over or knowledge about activities at the facility.

Congressional intent to attach liability directly on an owner is clearly delineated in the language of Sections 3004 and 3005 of RCRA. Section 3004(a) of RCRA requires the Administrator to promulgate regulations to protect human health and the environment ". . . applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste . . ." [emphasis added]. Further, Section 3005 of RCRA requires ". . . each person owning or operating . . . a facility for the treatment, storage or disposal of hazardous waste . . . to have a permit . . ." [emphasis added]. Thus, Congress made it clear that the regulatory requirements of RCRA apply equally to an owner and an operator of a facility, and each has the responsibility to ensure that a permit is obtained for a facility. This intent is further reinforced by the legislative history of RCRA cited on page 8 of the original Memorandum in Support of Appeal. All of the above indicate that Congress was aware of the dangers associated with improper hazardous waste management activities and sought to place responsibility on property owners, so that they could not turn a blind eye to potentially harmful activities conducted on property they may lease to others.

In promulgating regulations to implement RCRA, EPA expressed its intent to hold land owners jointly and severally liable. The preamble to the May 19, 1980 Federal Register notice explains this intent:

> [W]here there has been a default on any of the regulatory provisions, the Agency will attempt to gain compliance . . . . [T]he Agency may bring enforcement action against either the owner or operator or both. EPA considers the owner (or owners) and operator of a facility jointly and severally responsible to the Agency for carrying out the requirements . . . . Hazardous Waste and Consolidated Permit Regulations, 45 Fed. Reg. 33169 (1980).

The notice goes on to state that both the owner and the operator remain liable regardless of any arrangement between them. Id. The rationale expressed in the preamble is consistent with the legislative history of RCRA, as discussed on page 8 of the original Memorandum in Support of Appeal, which states that responsibility for compliance rests equally with the owner and operator.

Judge Yost asserts that he is unsure how the signing of an application for a Part A or Part B permit somehow advises a landowner of the potential for vicarious liability. Initial Decision, October 21, 1985, at 26. Admittedly, facility owners may be absent from the location of a hazardous waste management facility which is operated by another party. Such absentee facility owners, in some cases, may not know or care about the operation of the facility on their property. Precisely because of the nature of the business of a hazardous waste management facility, however, the owner of such property must take direct responsibility for proper use of his or her property:

> The Agency believes that Congress intended that they [owners] should know and understand that they are assuming joint responsibility for compliance with these regulations when they lease their land to a hazardous waste facility. Therefore, to ensure their knowledge, the Agency will require owners to co-sign the permit application and any final permit for the facility. Hazardous Waste and Consolidated Permit Regulations, 45 Fed. Reg. 33169 (1980).

This statement certainly is intended to impose broader liability than that suggested as appropriate by the ALJ. Initial Decision, October 21, 1985, at 26.

The potential implications of limiting an owner's liability under RCRA are a major concern to EPA nationally. Requiring the owner of a RCRA facility to exert control at the facility as a requisite to enforcement action against him, as suggested by Judge Yost, is contrary to the explicit language of RCRA. On a national level, the purpose of RCRA is to protect human health and the environment through a regulatory program. Where compliance by the operator is not achieved, the owner is jointly and severally liable. To decide otherwise negates EPA's ability to carry out RCRA's purpose. A precedential finding that land owners are not jointly and severally liable under RCRA would preclude EPA's enforcement action against a large class of responsible parties. We submit, therefore, that an ALJ cannot properly rule that "owners" are not liable, under RCRA, when the statutory language, its legislative history, and its implementing regulations, clearly impose duties on all

owners and further impose liability for failure to comply with those duties.[1/]

2. AUTHORITY TO ISSUE COMPLIANCE ORDERS

a. The EPA DELEGATIONS MANUAL Grants Authority to Issue Compliance Orders Only to Agency Enforcement Personnel, not ALJs.

The EPA DELEGATIONS MANUAL contains three delegations relating to RCRA Subtitle C compliance orders: 8-9-A, 8-9-B, and 8-9-C. (See Attachments.) None of these provisions delegates any authority to ALJs. Delegation 8-9-A expressly delegates authority "to issue compliance orders" (before the respondent files an Answer in the administrative proceeding, or defaults) to Regional Administrators and the AA for OSWER--officials with enforcement responsibilities. Delegation 8-9-B does not deal with compliance orders themselves, but delegates authority "to sign consent agreements" (after the respondent has filed an Answer or has defaulted) to Regional Administrators and the AA for OECM--again, officials with enforcement responsibilities. Under Delegation 8-9-C, Regional Administrators have authority "to issue consent orders" in cases which are settled; in cases which are not concluded by settlement, the

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1/ This Supplemental Brief does not discuss the jurisdictional issue regarding the ALJ's determination that EPA's regulations are invalid. We rely on the original Memorandum in Support of Appeal which discusses the jurisdictional issue and presents case law in support of our position.

Judicial Officer has authority "to issue final orders assessing penalties, or revoking or suspending permits under SWDA."

Very few EPA Delegations of Authority mention the Administrative Law Judges. Delegation 1-37 generally delegates to the ALJ's authority "to hold hearings and perform related duties [under the A.P.A.]." However, under general rules of construction, Delegation 8-9 controls, since it is more specific and was more recently adopted.

40 C.F.R. §22.27 should not be interpreted as subtly accomplishing a result not found in the Delegations Manual itself. Under these procedural regulations, the ALJ is to issue a "proposed final order." This "order" is not a "compliance order", but simply the declaratory determination authorized by 5 USC § 554(e) embodying the Agency's final decision.2/ The "proposed final order" prepared by the ALJ is not itself a "compliance order." Rather, as explained in the Agency's main brief at 15, any modified compliance order that may be necessary to accommodate the ALJ's decision must be issued by the Regional Administrator, just as the Administrator (rather than the court of appeals) would issue revised regulations to correct any deficiencies found on judicial review.3/ An analogy is provided

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2/ 5 U.S.C. §554(e) states: "[t]he Agency, with like effect as in the case of other orders, . . . may issue a declaratory order to terminate a controversy or remove uncertainty."

3/ Alternatively, the Judicial Officer (but not the ALJ) may issue a Compliance Order under Delegation 8-9-C.

in In the Matter of NPDES Permit for Shell Oil Co., NPDES Appeal No. 75-2, and in In the Matter of NPDES Permit for Marathon Oil Co., NPDES Appeal No. 75-3, in which the Administrator remanded the cases to the Regional Administrator to issue appropriately modified NPDES permits in accord with the Administrator's decision, even though the Administrator clearly had executive authority to issue the permits himself.

b. The Initial Decision Erroneously Converts The Compliance Order Process From the Issuance of Governmental Executive Commands To The Adjudicative Imposition Of A Sanction Or Relief To EPA.

Instead of following the principles declared in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) to determine whether the order-issuing official acted arbitrarily, capriciously, not in accordance with law, or in a manner abusing his/her discretion (which is what the ALJ should have done), he undertook to exercise both executive authority as well as adjudicative authority by fashioning his own compliance order. In footnote #3 at page 28, the Initial Decision states in pertinent part:

> "40 C.F.R. §22.27 clearly directs the ALJ to issue an Initial Decision which contains, inter alia, a civil penalty and a proposed Final Order. Common sense dictates that a Compliance Order must be consistent with the factual and legal findings of the Court. If portions of the Complaint are dismissed or no violation is found, it would be absurd to leave intact those portions of the Compliance Order dealing with those issues. Conversely, additional facts developed at the hearing may require some supplement to the original compliance order to assure that all violations and environmental hazards are addressed and remedied."

This claim of power to add to an Order's mandate is based entirely on the ALJ's acknowledged power to declare part of the Order invalid. If valid, it would enable the ALJ to act as investigator, prosecutor and judge to expedite protection of the environment. While surely well-intended, that claim is erroneous. Finding violations of RCRA and determining the appropriate enforcement responses, are, in the first instance, exclusively prosecutorial activities which have been entrusted to the Agency's enforcement personnel. See, EPA DELEGATIONS MANUAL, SOLID WASTE MANAGEMENT ACT, 8-9-A.

c. The Initial Decision Here Violates The Principle Of Separation Of Functions

In taking it upon himself to issue a Compliance Order under § 3008 of RCRA, the ALJ improperly assumed the role of Agency enforcement officials, thus violating the principle known in administrative law as "separation of functions," which Professor Davis explains as follows:

> "Judging should be separated from functions that are incompatible with judging; that is what is meant by separation of functions. One main idea is that an individual who tries to win for one side should not participate in judging." 3 Davis, Administrative Law Treatise (2d. ed. 1980) at 340.

The requirement to separate Administrative Law Judges from the investigating and prosecuting officers of the agency is found in the Administrative Procedure Act:

> "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate in or advise in the decision . . .." 5 U.S.C. §557(d). 4/

In Heckler v. Chaney, 470 U.S. ___, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985), the Supreme Court recently ruled that an agency's decision not to commence an enforcement action involves executive, discretionary matters "peculiarly within its expertise," so that such decisions are not suitable for review by the judicial branch:

> "The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." 84 L. Ed. 2d at 723-24.

The same rationale applies to administrative enforcement

4/ See also, 5 U.S.C. § 3105, which prohibits ALJ's from "perform[ing] duties inconsistent with their duties and responsibilities as administrative law judges."

actions under review by ALJs.[5/] The Agency's enforcement offices, rather than the ALJ, are best situated to consider and balance the factors listed in Chaney, and decide on the proper enforcement action to take. The Administrative Law Judges ought to defer to the expertise of the Agency's enforcement officials, just as the Supreme Court has directed Article III courts to do.

In past decisions, EPA ALJ's have appropriately exercised restraint when invited to take action beyond their authority. Judge Yost provided a prime example of such judicial restraint in In the Matter of NPDES Permit for Louisville Gas & Electric Co. Trimble Co. Power Plant, (Order and Initial Decision dated December 8, 1980), in which he properly applied a narrow scope of review when considering the adequacy of an EIS:

> "As an Administrative Law Judge (ALJ) am I the Agency? Do I possess this expertise? May I substitute my judgement for that of the Agency? I think not. . . . Logic, however, would tend to dictate the futility of my reviewing final Agency action on a de novo basis, making independent determinations concerning whether a particular environmental consequence is so heavy as to outweigh any benefits . . . ." Id. at 25.

EPA's enforcement offices submit that it would have been proper

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5/ The "separation of powers" doctrine which applies to the legislative, executive, and judicial branches of government, upon which Chaney is based in part, is analogous to the separation of functions doctrine (applicable to administrative agencies). Although administrative law judges are certainly not Article III courts, they do perform quasi-judicial functions.

to follow similar principles in this case.

In summary, the issuance of RCRA Compliance Orders is an enforcement function which, under applicable EPA delegations of authority, may be exercised only by authorized enforcement personnel, and not ALJs.

CONCLUSION

In conclusion, the Initial Decision should be modified to resolve the errors assigned on this appeal. Such modification, in the manner we have urged, will avoid the adverse precedential impact with which the Agency is concerned.

Respectfully submitted this 6th day of January 1986,

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SOLID WASTE DISPOSAL ACT (SWDA)

8-9-A. Administrative Enforcement: Issuance of Complaints, Signing of Consent Agreements, etc.

1. AUTHORITY. Pursuant to the Solid Waste Disposal Act (SWDA): to make determinations of violations of Subtitle C; to issue warning letters or other notices; to issue compliance orders; to issue notices to States; to issue complaints; and to negotiate and sign consent agreements memorializing settlements between the Agency and respondents.

2. TO WHOM DELEGATED. Regional Administrators and Assistant Administrator for Solid Waste and Emergency Response.

3. LIMITATIONS.

a. This authority may only be exercised prior to the alleged violator's filing an answer or failure to file an answer to a complaint.

b. The Assistant Administrator for Solid Waste and Emergency Response may exercise these authorities only for those cases initiated by Headquarters and must notify any affected Regional Administrators or their designees when exercising any of the above authorities.

c. The Regional Administrators may exercise these authorities only for those cases initiated by the Regions. The delegatees of the Regional Administrators must consult with the Regional Counsels or their designees prior to issuing complaints, and prior to signing consent agreements authorized under paragraph 1.

4. REDELEGATION AUTHORITY. This authority may be redelegated.

5. ADDITIONAL REFERENCES.

a. Sections 3001(b)(3)(B)(iv) and 3008 (except 3008(h)) of SWDA.

b. See the Chapter 8 Delegations entitled:

(1) "Determination That There Is or Has Been a Release";

(2) "Administrative Enforcement - Corrective Action Authority: Issuance of Complaints and Orders, Signing of Consent Agreements"; and

(3) "Administrative Enforcement - Corrective Action: Agency Representation in Hearings and Signing of Consent Agreements."

SOLID WASTE DISPOSAL ACT (SWDA)

8-9-B. Administrative Enforcement: Agency Representation In Hearings and Signing of Consent Agreements

1. AUTHORITY.

a. To represent the Agency in administrative enforcement actions conducted under the Solid Waste Disposal Act (SWDA) and 5 U.S.C. Section 554.

b. To negotiate consent agreements between the Agency and respondents resulting from such enforcement action; and to initiate an appeal from an administrative determination and represent the Agency in such appeals.

c. To sign consent agreements between the Agency and respondents resulting from such enforcement action.

2. TO WHOM DELEGATED. Assistant Administrator for Enforcement and Compliance Monitoring and the Regional Administrators.

3. LIMITATIONS.

a. This authority may only be exercised after the alleged violator either files an answer or fails to file an answer.

b. The Assistant Administrator for Enforcement and Compliance Monitoring may exercise the authority only for those cases initiated by Headquarters.

c. The Regional Administrators may exercise the authority only for those cases initiated by the Regions.

d. The Regional Administrators or their delegatees must consult with the Assistant Administrator for Enforcement and Compliance Monitoring prior to initiating an appeal.

4. REDELEGATION AUTHORITY. This authority may be redelegated.

5. ADDITIONAL REFERENCES.

a. Sections 3001(b)(3)(B)(iv) and 3008 (except 3008(h)) of SWDA; 40 CFR 22.

b. See the Chapter 8 Delegation entitled, "Administrative Enforcement - Corrective Action: Agency Representation In Hearings and Signing of Consent Agreements."

SOLID WASTE DISPOSAL ACT (SWDA)

8-9-C. Administrative Enforcement: Issuance of Consent Orders and Final Orders

1. AUTHORITY.

a. To issue consent orders memorializing settlements between the Agency and respondents resulting from administrative enforcement actions under Subtitle C of the Solid Waste Disposal Act (SWDA).

b. To issue final orders assessing penalties, or revoking or suspending permits under SWDA.

2. TO WHOM DELEGATED. Regional Administrators and Headquarters Judicial Officer.

3. LIMITATIONS.

a. The Regional Administrators may only exercise the authority described in paragraph 1.a.

b. The Headquarters Judicial Officer and Regional Judicial Officers may not be employed by the Office of Enforcement and Compliance Monitoring or by any program office directly associated with the type of violation at issue in the involved proceeding.

4. REDELEGATION AUTHORITY. The Regional Administrators may redelegate this authority to the Regional Judicial Officers. The Headquarters Chief Judicial Officer may not redelegate this authority.

5. ADDITIONAL REFERENCES. 40 CFR 22.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the U.S. Environmental Protection Agency, and that on the date shown below the original of the ATTACHED document was hand-carried to the EPA Hearing Clerk in Washington, D.C. (A-110), and copies were mailed by first-class mail, postage prepaid, to the individuals on the attached Service List.

Dated: January 6, 1986

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